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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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EXAMINER

SMALLEY, JAMES N

ART UNIT	PAPER NUMBER
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3727

DATE MAILED: 06/29/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No. 10/721,029	Applicant(s) GERMAN ET AL.	
	Examiner James N. Smalley	Art Unit 3727	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☐ Responsive to communication(s) filed on ____.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-28 is/are pending in the application.
 4a) Of the above claim(s) ____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) ____ is/are allowed.
- 6) ☒ Claim(s) 1-27 is/are rejected.
- 7) ☐ Claim(s) 28 is/are objected to.
- 8) ☐ Claim(s) ____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on ____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
 Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
 Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
 a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. ____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|---|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. ____. |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date <u>03/01/2004</u> . | 6) <input type="checkbox"/> Other: ____. |

DETAILED ACTION

Claim Rejections - 35 USC § 102

1. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

2. Claims 1-5, 9-13, 14-18 and 22-26 are rejected under 35 U.S.C. 102(b) as being anticipated by Barriac US 4,807,770.

Barriac '770 teaches a container neck having external threads (48), and a closure comprising a circular disk (14) with a peripheral curl (24), a seal (18), and a band (16) including an annular skirt (20) with internal threads (22), and a plurality of fins (26) and (28) which engage the disk curl. Fins (28) have an oblique surface relative to the band's longitudinal axis.

Regarding the limitations of claims 1, 9-10, 14 and 22-23, Examiner asserts the closure of Barriac '770 inherently anticipates the mechanical deformation claimed by the Applicant. Examiner notes col. 5, lines 15-17, teaching the lid retaining portion (16) is to be formed of a "semi-rigid thermoplastic material" (emphasis added); col. 5, lines 21-23, teaching the portion can be formed of "flexible polyesters and copolyesters" (emphasis added); col. 5, lines 12-14, teaching the lid (14) is formed of "tin plated steel sheet" (emphasis added); and col. 5, lines 39-42, teaching the lid portion (14) is provided with a curl to "add rigidity to the lid portion" (emphasis added). The cited passages note the lid retaining portion (16) can be formed of a flexible, semi-rigid thermoplastic, which will engage the rigid curl of a steel disk (14), as the lid is tightened onto the container neck. Thus, the passages teach a disparity in material hardnesses, and it is the Examiner's contention that the plastic fins will inherently be deformed to a certain degree. Furthermore, it is known that mechanical deformations of thermoplastics are localized, and create regions of elastic deformation, adjacent regions of non-elastic deformation.

Regarding claims 2 and 15, the claims appear to limit a manufacturing process, of which the structure of Barriac '770 appears capable of undergoing. Examiner notes col. 5, lines 15-17, teaching the lid retaining portion (16) is to be formed of a "semi-rigid thermoplastic material" (emphasis added). The

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material will inherently deform under thermal treatment. It has been held that method limitations in a product claim do not serve to patentably distinguish the claimed product from the prior art. See *In re Thorpe*, 777 F.2d 695, 227 USPQ 964 (Fed. Cir. 1985). Thus, even though a product-by-process claim is limited and defined by a process, determination of patentability is based on the product itself.

Accordingly, if the product in a product-by-process claim is the same or obvious from a product of the prior art, the claim is unpatentable even though the prior art product was made by a different process.

Thorpe, 777 F.2d at 697, 227 USPQ at 966; *In re Marosi*, 710 F.2d 799, 218 USPQ 289 (Fed. Cir. 1983).

Regarding claims 4-5 and 17-18, Examiner notes col. 5, lines 39-42, teaching the curl allows for "safe grasping by a user." Furthermore, such composite closures are known to be opened by first removing the outer, threaded closure, and then prying opening the metallic disk closure.

Regarding claims 11 and 24, the Examiner is unable to locate a clear and explicit definition defining the structure of the word, "gusset," in the Applicant's Specification. Accordingly, the flanges (26) of Barriac '770 are read to be "gussets."

Claim Rejections - 35 USC § 103

3. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

4. Claims 1-5, 8, 11-18, 21 and 24-26 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ochs' US 3,913,772 in view of Robinson et al. US 4,066,181.

Ochs '772 teaches a tamperproof closure and cap comprising a thermoplastic ring (8) and metallic disk (2) with a peripheral curl.

Ochs '772 does not teach a plurality of fins to deformably receive a peripheral curl. However, Examiner notes Ochs '772 teaches a groove (11) to receive the curl of the disk, before applying the cap in a capping operation.

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Robinson '181 teaches a plurality of fins having a groove, in a plastic overcap, to receive the peripheral curl of a metallic disk closure, before applying the cap in a capping operation.

Both references teach mechanical equivalent means for securing a peripheral curl of a metallic disk, within a plastic overcap/ring, prior to application on a bottle neck in a capping operation, and are thus found to be obvious mechanical equivalents.

It would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the closure of Ochs '772, providing the fins taught by Robinson '181, because the two structures are art-recognized mechanical equivalents, both equally capable of securing the peripheral curl of a metallic disk closure before being applied on the neck of a container in a capping operation.

Regarding claims 1 and 14, Examiner notes the claim is a product-by-process limitation. It has been held that method limitations in a product claim do not serve to patentably distinguish the claimed product from the prior art. See *In re Thorpe*, 777 F.2d 695, 227 USPQ 964 (Fed. Cir. 1985). Thus, even though a product-by-process claim is limited and defined by a process, determination of patentability is based on the product itself. Accordingly, if the product in a product-by-process claim is the same or obvious from a product of the prior art, the claim is unpatentable even though the prior art product was made by a different process. *Thorpe*, 777 F.2d at 697, 227 USPQ at 966; *In re Marosi*, 710 F.2d 799, 218 USPQ 289 (Fed. Cir. 1983). The concave surfaces (19) of Robinson '181 appear identical to the impressions (142) formed in the Applicant's gusset. Examiner notes the mechanical deformation of the gusset, to create an elastically-deformed region adjacent a non-elastically deformed region, appears to comprise a sufficient material difference of the product affected by the process, but this feature is claimed in claims 9-10 and 22-23.

Regarding claims 2 and 15, the claims appear to limit a manufacturing process, of which the structure of Ochs '772 appears capable of undergoing, as it is formed of plastic. The material will inherently deform under thermal treatment. It has been held that method limitations in a product claim do not serve to patentably distinguish the claimed product from the prior art. See *In re Thorpe*, 777 F.2d 695, 227 USPQ 964 (Fed. Cir. 1985). Thus, even though a product-by-process claim is limited and defined by a process, determination of patentability is based on the product itself. Accordingly, if the

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product in a product-by-process claim is the same or obvious from a product of the prior art, the claim is unpatentable even though the prior art product was made by a different process. *Thorpe*, 777 F.2d at 697, 227 USPQ at 966; *In re Marosi*, 710 F.2d 799, 218 USPQ 289 (Fed. Cir. 1983).

Regarding claims 4 and 17, Examiner notes Ochs '772, col. 3, lines 30-34, teaching a slight rotation of the plastic skirt (13) occurs without a corresponding rotation of the separate cap cover.

Regarding claims 11 and 24, the Examiner is unable to locate a clear and explicit definition defining the structure of the word, "gusset," in the Applicant's Specification. Accordingly, the flanges (26) of Robinson '181 are read to be "gussets."

5. Claims 6-7 and 19-20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Barriac US 4,807,770, as applied above under 35 U.S.C. 102(b) to claims 1 and 14, in view of Ochs US 4,809,858.

Barriac '770 does not teach opening means whereby torque generated between the band and disk will substantially open the band and disk together.

Ochs '858 teaches it is known to modify the torque between sealing faces (12) and (14), in order to provide a sufficient opening torque between a band and disk.

Examiner notes that while Ochs '858 teaches a continuous, flat surface between the disk and band, while Barriac '770 teaches gussets, one having ordinary skill would be able to use the teaching of Ochs '858 in order to configure the force between the two elements such that a sufficient opening torque will be provided.

It would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the frictional connection between the band and the disk of Barriac '770, in order to provide a sufficient level of friction so as to provide a sufficient opening torque between the two elements in order to remove the disk from the container, as taught by Ochs '858, motivated by the benefit of allowing a user to remove the disk in one opening movement.

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6. Claims 6-7 and 19-20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ochs US 3,913,772 in view of Robinson et al. US 4,066,181 as applied above under 35 U.S.C 103(a) to claims 1 and 14, and further in view of Ochs US 4,809,858.

Ochs '772, as modified, does not teach opening means whereby torque generated between the band and disk will substantially open the band and disk together.

Ochs '858 teaches it is known to modify the torque between sealing faces (12) and (14), in order to provide a sufficient opening torque between a band and disk.

Examiner notes that while Ochs '858 teaches a continuous, flat surface between the disk and band, while Ochs '772, as modified, teaches gussets, one having ordinary skill would be able to use the teaching of Ochs '858 in order to configure the force between the two elements such that a sufficient opening torque will be provided.

It would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the frictional connection between the band and the disk of Ochs '772, as modified, in order to provide a sufficient level of friction so as to provide a sufficient opening torque between the two elements in order to remove the disk from the container, as taught by Ochs '858, motivated by the benefit of allowing a user to remove the disk in one opening movement.

Double Patenting

7. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Omum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the

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conflicting application or patent is shown to be commonly owned with this application. See 37

CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

8. Claim 27 is rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1 and 18 of U.S. Patent No. 6,662,958 (German et al.).

Although the conflicting claims are not identical, they are not patentably distinct from each other because the subject matter of instant claim 1 appears to be covered by the limitations of claim 18 of German '958, such that the instant claim is not patentably distinct. Examiner notes German '958 claims "fins;" the instant invention claims "gussets;" however, due to the lack of a clear an explicit definition in the instant Specification, the two limitations are not patentably distinct.

Allowable Subject Matter

9. Claim 28 is objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

Conclusion

10. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure: See attached PTO-892, teaching various composite closures.

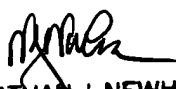
Any inquiry concerning this communication or earlier communications from the examiner should be directed to James N. Smalley whose telephone number is (571) 272-4547. The examiner can normally be reached on M-Th 9-6:30, Alternate Fri 9-5:30.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Lee Young can be reached on (571) 272-4549. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

jns


NATHAN J. NEWHOUSE
PRIMARY EXAMINER
6/27/05